In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The decision of the California Public Utilities Commission is reported at 50 Cal. P.U.C. 749, but, strangely, is omitted from the Transcript of Record.[1] The order of the California Supreme Court denying a petition for writ of review is noted in 38 A.C. 323 (R. 38) and its order denying rehearing is noted in 38 A.C. 484 (R. 46). Neither of such orders is accompanied by an opinion.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

The over-all question is whether the California Public Utilities Commission could, consistently with the Federal Power Act, order California Electric Power Company to charge certain rates in selling electricity to Mineral County, Nevada, said County taking delivery in California and transmitting the energy over its own lines to Nevada for resale to ultimate consumers in that state.

The subsidiary questions are:

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[1] Petitioner Mineral County as indicated in its Petition, Footnote 1, page 1, seeks to cure the inadequate record by referring to the "more complete record in the related case of *United States v. The Public Utilities Commission of the State of California*, No. 205, this term." We shall of necessity adopt Mineral County's procedure of referring to that record and shall designate it in the same way, i.e.,: (Govt. R. .....).

(1) Does Part I of the Federal Power Act, giving the Federal Power Commission jurisdiction over sales of electric energy by licensees only in the exceptional circumstances set forth in Sections 19 and 20, give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the California Commission is admittedly a qualified commission, where the Nevada Public Service Commission is specifically authorized by statute to regulate the rates which Mineral County charges its consumers, and where the states of California and Nevada have not been shown unable to agree on the rates charged by California Electric Power Company to Mineral County for wholesale electric energy?

(2) Does Part II of the Federal Power Act, giving the Federal Power Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce but . . . not . . . any other sale" (Sec. 201(b)), give the Federal Power Commission jurisdiction under the particular facts, to the exclusion of the California Commission, where the purchaser is not a public utility but Mineral County, a political subdivision of Nevada? The answer depends upon (a) the nature of the sales as being in interstate commerce or not; (b) the definition of "person" in Section 3(4) and the application thereof to the facts in construing Section 201(d) of the Act which defines "sales of electric energy at wholesale"; (c) the applicability of Section 201(f) exempting political subdivisions of a state from the provisions of Part II; (d) the applicability of Sections 201(a) and 201(b) which preserve state jurisdiction if it existed before.

STATUTES INVOLVED.

The pertinent provisions of the Federal Power Act (21 Stat. 1063, as amended by Title II of the Public Utilities Act of 1935, 49 Stat. 838, 16 U.S.C. 791a, *et seq.*) appear in the pamphlet copy of the Act which it is understood was submitted with the petition in the related case of *United States v. Public Utilities Commission*, No. 205, this term.

The pertinent provision of the Nevada Statutes is Section 16, Nevada Statutes of 1925, page 55. It is quoted below on page 12.

STATEMENT.

A jurisdictional dispute exists between the California Public Utilities Commission and the Federal Power Commission over the regulation of rates for sales of electric energy by California Electric Power Company to Mineral County.[2] The California Commission's order has been sustained by the California Supreme Court, whose action in denying a writ of review constitutes a determination upon the merits.[3] The Federal

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[2]Mineral County, a political subdivision of Nevada, is designated "Mineral County Power System" in selling electric energy to consumers in the County.

[3]Public Utilities Code (Cal. Stats. 1951, ch. 764), Section 1757. *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 747 (1936); *People v. Hadley*, 66 Cal. App. 370, 375 (1924). In *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366 (1920), this Court recognized that under the California statute the denial of a writ of review by the California Supreme Court respecting an order of the Public Utilities Commission (formerly Railroad Commission) is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority

Power Commission's order (reversing the examiner's proposed opinion) has been subjected to review before the United States Court of Appeals for the Ninth Circuit pursuant to Section 313(b) of the Federal Power Act. *California Electric Power Company v. Federal Power Commission,* C.A. 9, No. 12987. Oral argument was had on August 4, 1952. No decision has been rendered to date.

Mineral County's position is that the sales to it by California Electric Power Company are subject to Federal Power Commission jurisdiction, not California Commission jurisdiction. Mineral County went so far as to adopt, as its points and authorities in seeking California Supreme Court review, the opinion of the Federal Power Commission in the cognate show-cause proceeding (R. 4), an opinion which for the time being means lower rates to Mineral County than those ordered by the California Commission. Such latter circumstance would suggest the motivation for Mineral County's position.

Since the energy which California Electric Power Company sells to Mineral County is derived in part from federal water power projects of which the company is licensee, and since the energy crosses the state line into Nevada where Mineral County as purchaser resells the energy to consumers in the County, both Part I of the Federal Power Act (applying to sales by licensees) and Part II of the Act (applying to sales at wholesale in interstate commerce) are involved in considering the question of jurisdiction.

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or violate any right of the several petitioners under the Constitution of the United States or of the state of California". (251 U.S. at 372).

ARGUMENT.

While admittedly this case raises questions under the Federal Power Act respecting the division between the States and the Federal Government of regulatory jurisdiction over sales of electric energy, it is believed this Court will desire to weigh the following circumstances in determining whether a writ of certiorari should issue:

1. THE OVER-ALL QUESTION IS PECULIARLY NARROW.

The fact that Mineral County is the purchaser is a controlling factor in determining the jurisdictional question. Accordingly, whatever the decision, the case can have no general applicability. Nearly all large purchases of electricity for consumption in another state are made by public utility distribution companies, not by political subdivisions of a state.

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2. THE CASE HAS SIGNIFICANCE ONLY WHEN RELATED TO ITS PECULIAR FACTS.

Under Part I of the Federal Power Act, state jurisdiction over sales by licensees is vouchsafed even where the sales are in interstate commerce, provided (a) the states "directly concerned" (b) have adequate regulatory bodies and (c) the states have not been shown unable to agree on the rates to be charged. These are largely factual determinations. Accordingly any case involving them can have significance only as limited by those facts. Such circumstance may have had impelling influence in this

Court's refusal to issue a writ of certiorari in the First and Second *Safe Harbor* cases.[4]

Not only under Part I but under Part III the peculiar facts render the case of limited significance. The sales are to a political subdivision of a state. The determination whether such sales are "sales to a person for resale" can have little general applicability.

3. THE CALIFORNIA COMMISSION'S DECISION DID NOT DEPEND UPON ANY FINDING THAT THE SALES ARE IN INTRASTATE COMMERCE.

It may be argued plausibly that the sales are not in interstate but intrastate commerce as defined in Section 201(b). See Brief in Opposition herein, page 2, filed by California Electric Power Company. However, the California Commission came to its conclusion independently of the interstate commerce question. In construing the Federal Power Act it assumed, for purposes of argument at each juncture in the development of the decision, that interstate sales were involved. Thus there is eliminated any concern which this Court might entertain, at this stage of the proceeding, as to the correctness of any determination below respecting the interstate or intrastate nature of the sales.

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[4] *Safe Harbor Water Power Corp. v. Federal Power Commission*, 124 F. 2d 800 (3d Cir. 1941), cert. denied, 316 U.S. 663 (1942); *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F. 2d 179 (3d Cir. 1950), cert. denied, 339 U.S. 957 (1951).

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Respondents.

BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

Statement of the Case.

Because this case so closely resembles No. 205, the United States of America v. the same Respondents, we believe it will be more considerate of the Court and promote clarity if we do not repeat verbatim those parts of the brief which would be the same as they appear in our brief in No. 205. Accordingly certain points will be covered by reference to our brief in that case.

It will be observed that Petitioner's Brief (p. 1) refers to the Record in No. 205 as "Govt. R." for the provisions of Decision No. 45913 of California Public Utilities Com-

mission, which is omitted from the Record in this case, No. 206. We will be obliged, likewise, to refer to the Record in No. 205 for some facts omitted from the Record herein.

The ultimate question involved in this case is whether Federal Power Commission (FPC) or California Public Utilities Commission (California Commission) with or without concurrence of Nevada Public Service Commission (Nevada Commission) has authority to regulate rates charged by Respondent, California Electric Power Company (Power Company or Company), for electric energy delivered and sold at its Mill Creek Plant in Mono County, California, to Mineral County Power System (Mineral County), which transmits such energy over its own transmission line for sale and distribution to the public in Mineral County, Nevada.

Company's Electric System.

Power Company renders public utility electric service in Southeastern California in parts of Mono, Inyo, Kern, San Bernardino, Riverside and Imperial Counties, and, to a much less extent, in Nye and Esmeralda Counties, Nevada. Its system extends in a fairly straight line about 300 miles from Bridgeport, the county seat of Mono County, California, to San Bernardino, California, from which it widens out into general areas of San Bernardino and Riverside Counties, California, where its largest service areas are located.

Power Company is subject to the jurisdiction of California Commission pursuant to Public Utilities Act of said state (Calif. Stat. 1915, p. 115, as amended; Deering Gen. L. Act 6386).

Power Company is also subject to the jurisdiction of Nevada Public Service Commission by reason of business done in Nye and Esmeralda Counties, Nevada, pursuant to the Public Service Commission of said state (Nev. Stat. 1919, p. 198; Nev. Comp. L. 1929, Secs. 6100 *et seq.*). Said Company is not, however, engaged in business in Mineral County, Nevada, and owns no facilities therein, its service in Nye and Esmeralda Counties being entirely distinct from its sale to Mineral County at Mill Creek, California, for resale in Mineral County, Nevada.

Licenses.

Power Company is a licensee [R. No. 205 p. 1] under Part I of Federal Power Act (Act) (16 U. S. Code, Secs. 791 *et seq.*), holding licenses for five hydro-electric projects covering nine plants, seven of which are on the Northern Division of Power Company's system and involved in service to Mineral County as follows:

	Mono County, California.	
Project	1390 Mill Creek Plant	2,500 kw
"	1388 Poole Plant	9,600 "
"	1389 Rush Creek Plant	10,500 "
		22,600 kw
	Inyo County, California	
Project	1394 Bishop Creek Plant 2	6,000 kw
"	" " " " 3	7,200 "
"	" " " " 4	6,000 "
"	" " " " 5	3,500 "
(Non Project)	" " " 6	2,100 "
		24,800 kw

From Mill Creek Plant, a 55 kv (kilovolt) line extends to Leevining Substation into which feeds the Poole Plant on Leevining Creek. From Leevining Substation, a 100 kv tie line known as Northern Division Tie Line extends through and past Rush Creek Plant, thence to the Bishop Creek Plants a distance of some 60 miles.

From and by means of said 55 kv line between Mill Creek and Leevining Substation, all of the local customers of Power Company in Mono County are served, directly or indirectly, including the Town of Bridgeport, the Town of Leevining, the Garbutt Mine, the Navy, and Mineral County Power System. Power Company sells and delivers electric energy to Mineral County at the Mill Creek plant substation or terminal of said 55 kv line, and the energy is metered in said substation, all the facilities of which are owned by Company, except the oil circuit breakers and disconnect switches which belong to the United States Navy.

Mono County being a sparsely settled, remote, mountainous area, the entire electric load therein, including energy sold to the Navy and to Mineral County Power System for use in Nevada, amounts to only 3050 kw (kilowatts) and so is normally carried by one or more of the Mono County Plants of a total 22,600 kw capacity. At times, however, said plants are restricted in generation so that some power flows north out of the Bishop Creek Plants, and formerly, in part, from a plant of the City of Los Angeles on the Owens River pursuant to a contract subsequently terminated.

From Bishop Creek, energy in excess of the comparatively small amount sold in Mono and Inyo Counties, flows south. No energy ever flows from the south into

Bishop Creek or into the Northern Division lines, so that only the part of Company's system consisting of plants and lines on and north of Bishop Creek are involved herein.

Contract With Mineral County.

Mineral County Power System is not a public corporation or district, but is the name under which Mineral County carries on the purchase, sale and distribution of electric energy to the public in said county, under the direction of the Board of County Commissioners, who, ex-officio, constitute the Board of Managers of said county-owned utility, as provided in the Statutes of Nevada the material portions of which are printed in the Appendix to Petitioner's Brief. Mineral County owns and operates a 55 kilovolt line extending from Power Company's Mill Creek Plant in Mono County, California to the town of Hawthorne, Nevada, from which branch lines extend to other parts of said county.

As of October 5, 1945, Power Company and Mineral County entered into a contract providing that *for the term of 3 years* Company would furnish and Mineral County would purchase all of the electric energy required by the County for resale and distribution in the State of Nevada at rates set forth in the contract, such energy to be delivered at the Jordan (Mill Creek) plant of Company. Said contract provided that it was subject to filing with FPC and was so filed as "Rate Schedule FPC No. 15."

Rate Proceedings Before California Commission.

Within two years after the close of the war in 1945, inflation, with consequent increases in operating costs, necessitated Power Company's application (No. 28791)

in October 1947 to California Commission for a general increase of rates throughout the Company's California System [R. No. 205 p. 2]. Pursuant to hearings at which Mineral County was represented, the California Commission, on July 1, 1948, effective August 1, 1948, issued Decision No. 41798 [R. No. 205 pp. 2, 8] authorizing increases in rates generally throughout Company's California System. Among the schedules of rates fixed by said decision was Schedule P-3 applicable to the sale of electric energy for resale.

Said contract expired by its terms October 5, 1948, and thereupon, Company began to charge Mineral County according to rates in Schedule P-3 [R. No. 205 p. 9]. There then arose a dispute as to whether said Decision No. 41798 had or had not applied to the Mineral County contract or to any rate for service to Mineral County at Mill Creek, California, it appearing that, while said contract had not been expressly mentioned in said decision, it was evident from the evidence and exhibits in said proceeding that all of the calculations of Company's revenues and expenses, made by Company, by the Commission's Staff and by other interested parties, included revenues and expenses in connection with sales to Mineral County, and, particularly, was this true in spreading the increases in rates among the several classes of consumers on Company's system [R. No. 205 p. 8].

In order to settle this dispute, Power Company, on August 8, 1949, filed with California Commission its First Supplemental Application to Application No. 28791,

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BRIEF FOR RESPONDENT, CALIFORNIA ELECTRIC POWER COMPANY.

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requesting a determination that Schedule P-2 fixed by Decision No. 41798 was applicable to Mineral County or, if not, that a proper rate for Mineral County be fixed [R. No. 205 pp. 2, 6]. A hearing was held on said Supplemental Application October 7, 1949, at which Mineral County was represented. That hearing was continued to a later date.

Proceedings Before FPC.

Meanwhile, some correspondence between California Commission and FPC resulted in an agreement between the State and Federal Commissions to hold a concurrent hearing on the matter involved in said proceeding before California Commission and on an Order to Show Cause to be issued by FPC. On February 15, 1950, FPC issued and served upon Power Company its Order to Show Cause, which is not in the Record, but the nature of which can be judged from the final Order of April 12, 1951 [R. No. 205 pp. 35-41], since the latter sustained every finding and order proposed by the former.

Following the concurrent hearing, held March 20-21, 1950, that is, before FPC on said Order to Show Cause, and before California Commission on said Supplementary Application in Application No. 28791, the Hearing Examiner for FPC filed his report (initial decision under the Administrative Procedure Act; 5 U. S. C., Sec. 1007) in which he sustained the contentions of Power Company in every respect and recommended the dismissal of the Order to Show Cause.

After considerable delay, FPC, one Commissioner dissenting, on April 13, 1951, issued its Opinion No. 212 and Final Order [R. No. 205 pp. 24-41], reversing the Hearing Examiner on all points and, among other things, ordering that, [R. No. 205, p. 41] Power Company cease and desist from charging Navy any rate other than that named in said expired contract of 1945 which had been filed as Schedule No. 15.

The FPC Order went to the Court of Appeals for the 9th Circuit on Certiorari pursuant to Power Company's petition filed June 21, 1951, where all points were decided against the Company October 14, 1952. (*California Electric Power Company, a corporation, Petitioner, v. Federal Power Commission, Respondent, County of Mineral, State of Nevada, and United States of America, Intervenors,* No. 12,987, ...F. 2d .....) Petition for Certiorari has been filed in this Court December 11, 1952.

California Commission's Decision No. 45,913.

On July 3, 1951, California Commission issued Decision No. 45,913 [R. No. 205, p. 6]. Petition for Writ of Review was filed by Mineral County with the Supreme Court of California, August 29, 1951 [R. No. 205, p. 1], which was dismissed January 21, 1952 [R. No. 205, p. 68], and rehearing denied February 18, 1952 [R. No. 205, p. 74].

Certiorari was granted by the Supreme Court October 13, 1952.

ARGUMENT.

I.

Neither the Board of Managers of Mineral County Power System nor the District Attorney Have Any Authority to Maintain This Action or Review for the Purpose or Effect of Transferring the Regulatory Powers of Nevada Commission Over Mineral County Power System Into the Rate Fixing Jurisdiction of FPC.

Nevada Statutes 1925, pp. 59-60, provide in part:

> "Section 16. The maintenance and operation of said Mineral County Power System shall be under the control, supervision and authority of the board of managers, and rates charged to consumers for sale and distribution of electrical energy and current, and the tolls for telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to the supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis supplied.)

The same Act in Section 15(e) provides that:

> "(e) The district attorney shall, without additional compensation, act as attorney and counsellor for said utility, and perform such duties as attorney and counselor thereof as may be required of him by the Board of County Commissioners, * * *".

There is nothing in Nevada law which confers on the Board of Managers authority to do anything but to control and supervise the business entrusted to them, *subject*

to the rate regulatory powers of Nevada Commission, and there is nothing in the duties imposed on the District Attorney to do aught but to represent the Managers in the exercise of their aforesaid powers.

Neither the Board of Managers, the District Attorney, nor both, have any authority to renounce or overthrow or deny whatever jurisdiction Nevada Commission has over the public utility business in which the County is engaged. This jurisdiction under State Law is to supervise the rates fixed by the Board and to "revise, raise, or lower the same." But, by reason of that power, Nevada Commission answers the description in Section 20 of Federal Power Act as being *"a Commission or other authority to enforce the requirements of this Section within such State,"* and hence it, together with California Commission, is capable of performing the conditions of Section 20.

The District Attorney, on behalf of the Board of Managers, purports to reject and disclaim this right and power of Nevada Commission and to disrupt the plan of State rate regulation embraced in Section 20, without any authority from the State Legislature, the Governor, the Attorney General, or the Nevada Commission.

As in the case of the Navy, in No. 205, Petitioner in this case seems to have assumed that FPC will fix more advantageous rates than those fixed by one or both State Commissions, but this conclusion may be in error and is not a matter which the Board of Managers or the District Attorney is authorized to decide.

II.

History and Analysis of Federal Water Power Act, Also Called Federal Power Act.

Instead of repeating here what was said under this head in No. 205 (this Term) reference is made to our brief in that case for a full discussion of this point, which is there numbered III.

III.

Since Power Company Is a Licensee Under Part I of the Act and the States Concerned Are Not Unable to Agree Through Their Properly Constituted Authorities, Power Company's Rates to Mineral County Are to Be Regulated by State Commission or Commissions Under Sections 19 and 20 of the Act.

Instead of repeating here what was said under this head in No. 205 (this Term), reference is made to our brief in that case for a full discussion of this point, which is there numbered IV.

IV.

Power Company's Rates to Mineral County Are Not Subject to Federal Regulation Under Part II of the Act.

Irrespective of the application of Sections 19 and 20 of the Act, the provisions of Part II, particularly Sections 201, 205, and 206, do not by their language or intent apply to Company's sales to Mineral County. This does not mean that such businesses must go unregulated. California Commission has always considered it a part of the operations of Company's California system and subject to regulation as other rates for distribution of electric energy in California.

The history of the legislation shows that Congress appreciated the existence of a well established and efficiently functioning system of utility regulation in practically all of the states, and did not desire to interfere with or disrupt that establishment. Indeed, this principle was written into the Act (Sec. 201a) where it is said that federal regulation is "to extend only to those matters which are not subject to regulation by the states." This principle was recognized by this Court and the reasons explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), at pages 525-530. It was there said that, while not the sole guide to the interpretation of the Act, it cannot be ignored and some consideration must be given to it. But it is to be feared that some have construed this to require only a nod of recognition in passing, without any appreciable effect on final conclusions.

Large classes of interstate commerce are omitted from the Federal regulatory provisions of Part II and left to State and local regulation. Some of those omissions result from the language of Section 201, which states what facilities and operations are to be included, and other omissions result from definitions. Some of these definitions are found in Part II applicable only to Part II and some are found in Section 3 of Part I applicable to the whole Act, Parts I, II and III.

The classes of interstate commerce which are exempted from regulation under Part II are:

(1) Facilities and sales in local distribution are excluded by Section 201(b), even though electric energy imported from another state may be involved, which, as explained in *Connecticut L. & P. Co. v. Fed. Power Com.* (*supra*), constitutes typical interstate commerce down to the light bulbs or burner tips.

(2) Transmission or sales in interstate commerce where the energy is not resold by the purchaser but is consumed by the transmitter or by the purchaser are exempted by the provisions of Section 201(b). In order to effect federal regulation, there must be a two-step sale, that is, a sale to, and a resale by the purchaser.

(3) Transmission or sales in interstate commerce where the sales are made to governmental or public agencies or corporations, are expressly excluded by Section 201(d), where "sale of electric energy at wholesale" is defined to mean "sale of electric energy to any person for resale," and by Section 3(3) and (4) defining "person" to mean a private individual, corporation, joint stock company, partnership, association, business, trust, organized group of persons, receiver or trustee.

Power Company's sales to Mineral County are not "sales at wholesale in interstate commerce" subject to Part II because—

(a) They are not sales to a person as provided in Section 201(d);

(b) They are simply a part of Company's distribution business in Mono County, California.

Those points will be discussed separately.

(a) Company's Sales to Mineral County Are Not Sales to a "Person" as Required by Section 201(d).

Section 201(d) provides:

> "The term 'sales of electric energy at wholesale' when used in this Part means a sale of electric energy to any *person* for resale." (Emphasis added.)

Section 3 of the Act defines certain terms "for the purpose of this Act," that is, the whole Act, Parts I, II, and III. Paragraphs (3) (4) of that section define "person" to mean an individual, private corporation, partnership, association or other private organized group.

Therefore, governmental agencies are not "persons" which can be engaged in resale within the meaning of the Act.

This has been so well expressed by the General Counsel for FPC in a brief, filed in August 1951, in *United States ex.rel. Chapman v. Fed. Power Com.*, and *Virginia E. & P. Co.*, Nos 6273 and 6274 in the United States Court of Appeals for the 4th Circuit, that we quote and adopt his language, which, though it had reference only to the United States, is in principle applicable to a State or State agency:

> "'Person' is limited in Sec. 3(4) to mean 'an individual or a corporation.' This alternative definition excludes the United States. For the United States is clearly neither a corporation nor an individual.
>
> "Usage of the word 'person' elsewhere in the Act confirms this definition. As used throughout the Act, the word 'person' cannot include the United States. If it did, absurd or impossible situations would arise; the licensing provisions of the Act would apply to the Army Engineers, Bureau of Reclamation, T. V. A. and other agencies of the Federal Government; provisions of Part II of the Act relating to rates and service in interstate commerce would apply to the Secretary of the Interior, T. V. A., and other Federal agencies; and the Commission.

could sue to enjoin the United States under Sec. 314(a), ask for the issuance of writs of mandamus against the United States under Sec. 314(b), and request penalty fines against the United States under Sec. 316.

"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(18) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words

italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *

"From this action, it is abundantly clear that the Committee considered that 'person' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner admits that, according to the literal meaning of Section 201(d), Petitioner is not a "person" to whom energy can be sold for resale under the Act. But, basing its hope on such cases as *United States v. American Trucking Assn.*, 310 U. S. 534, Petitioner urges this

Court to disregard the words "to any person" in Section 201(d), because, it is further asserted, these words crept in with an amendment to the Act and through an inadvertence or "quirk of draftsmanship utterly unintended." It offers no proof of this; indeed its case seems to depend on the absence of any evidence and to gain whatever force it has from the fact that the legislative history is silent on the point of how, why, or by whom the critical words were added.

Respondent Power Company fully appreciates the length to which such cases as *American Trucking Assn.*, have gone, but believes this Court has never yet done any thing so extreme as Petitioner asks it to do here. In that case, the Court, after declaring that:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (P. 543.)

passes by the necessity for disregarding words which produce "absurd or futile results" and comes to the field where the present case is supposed to rest, that is, where

> "* * * the plain meaning did not produce absurd results, but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' * * *." (P. 543.)

and concludes that

> "*A few words of general connotation* appearing in the text of Statutes should not be given a wide meaning *contrary to a settled policy*, 'excepting as a different purpose is plainly shown.'" (P. 544.) (Emphasis added.)

The question there was whether the Motor Carrier Act which authorized Interstate Commerce Commission to prescribe "maximum hours of service of employees," applied to all employees or only those who operated motor vehicles. The former, said the Court (p. 544), would bring a result "quite distinct from the *settled practice* of Congress," which "has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only." (Citing three such acts of Congress and referring to similar acts in forty states.) (P. 545.)

Finally the Court said (p. 545) that the word "employee" was not a word of art and concluded that only those operating motor vehicles on the highways were included under the Act.

There are several clear distinctions between such cases as *American Trucking Assn.*, and the case at bar.

(1) Here the word "person" is a word of art, precisely defined and precisely used, and not merely one of "general connotation." Throughout the Act, the word "person," sometimes with another word qualifying or adding to it, is employed repeatedly and with fine distinction. In addition to its appearance in Section 201(d), the word "person," is used no less than 12 times to include only natural persons, firms, private corporations and the like, to-wit: in Sections 201(e), 202(b), 202(d), 202(e), 304(b), 305(b), 307(c), 307(g), 314(a), 314(b), 316(a), 316(b). Without words of qualifications, it is never used to indicate anything but private individuals, corporations and other private interests. In at least 6 places, where there was a purpose to include both private interests and governmental or public bodies or corporations, there were used, in addition to "person,"

such words as "state," "municipality," "State Commission," etc., to-wit: in Sections 3(13), 23(b), 303, 306, 309(a), 313(a).

(2) The application of Section 201(d) according to its literal meaning does not conflict with any "practice of Congress" and is not inconsistent with any other legislation.

(3) The literal application of Section 201(d) presents no absurd or even unreasonable or unworkable results, nor does it involve any dispute of jurisdiction between FPC and any other federal regulatory agency as in *American Trucking Assn.*

(4) The claim that administrative construction has been contrary to the literal meaning of Section 201(d) and should have weight is without merit, because the first case in which FPC held that it had jurisdiction of rates to municipalities for resale purposes was *Otter Tail Power Co.* (2 FPC 134, 137, 33 PUR NS 257, 260), decided as late as 1940 and not contested for the reason that Otter Tail Power Company requested FPC to take jurisdiction over such rates. The only contested cases were:

Connecticut Light & Power Co., 3 FPC 132 (after 1940);

In the Matter of Wisconsin-Michigan Power Co., FPC Docket E-6268, June 1, 1951;

In the Matter of Interstate L. & P. Co. and Wisconsin P. & L. Co., Docket E-6252, Opinion 215, July 12, 1951.

Certainly that brief and recent experience does not constitute administrative construction.

In *Pacific P. & L. Co. v. Fed. Power Com.* (C. A. D. C.), 184 F. 2d 272, it was held that even though FPC had, over a period of 20 years, issued hundreds of licenses for minor transmission lines purportedly under authority of Section 4(e) of the Act, and even though such licenses were still outstanding, such did not constitute an administrative construction of Section 4(e), and, hence, such minor lines not being "projects" were not within the licensing jurisdiction of FPC.

Petitioner cites *City of Los Angeles v. The Nevada-California Electric Corp.*, 2 FPC 104, 32 PUR NS 193, as of the same type as *Otter Tail Power Co.* (*supra*) and as holding that sales to a municipality for resale are sales to a "person." But that case is cited in error, for no sales at all were involved therein, and, hence, there was no opportunity for any application of the definition of "wholesale" as "sale to a person." In that case, the Company had contracted to transmit power for the City of Los Angeles from Hoover Dam to Los Angeles for a consideration. The power consisted solely of that allocated to the City by the United States at said Dam and belonged to the City from the instant of its generation, the Company at no time having any interest therein. The transaction came under the jurisdiction of FPC as a "transmission of electric energy in interstate commerce" as provided in Section 201(b) and not as a "sale of electric energy at wholesale."

(5) There is no patent defect in Section 201(d) as there is, for example, in the next to last line of Section 205(c) of the Act, where "regulate" is clearly an erroneous substitution for "relate." Nor is there anything incongruous or awkward, or inconvenient or unworkable

about Section 201(d). Its only fault is that certain influential people do not like it. They say it is contrary to the main purpose of the statute, but how do they prove that? The only evidence as to the purpose of the statute with respect to regulation of sales to governmental bodies and public corporations for resale is set forth in Section 201(d), itself, reenforced by Sections 201(e) and 201(f).

The fact that Section 201(d) exempts a certain class of interstate commerce in electric energy does not make it inconsistent with the rest of the Act, for it is admitted that two other classes of interstate commerce are omitted by Section 201(b): (i) distribution of electric energy, even that which has moved in interstate commerce, and (ii) transmission or sales of energy in interstate commerce where the energy is not resold, but is consumed by the transmitter or the purchaser. The consequence, therefore, of one or the other construction of Section 201(d) is merely to include more or less interstate commerce under the Act or to exempt less or more. Neither is inconsistent with the rest of the Act, the only question is: where did Congress draw the line between federally regulated and unregulated sales.

This Court itself has said in *American Trucking Assn.*:

> "Obviously, there is danger that the Courts' conclusion as to legislation purposes will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body."

Petitioner cites other cases which fall within familiar rules of construction but not closely in point here, for example, *Lawson v. Suwanee S. S. Co.*, 336 U. S. 198, where the literal definition in the statute produced obvious

incongruities and absurd results, and *Ohio v. Helvering*, 292 U. S. 360, where the statutory definition, itself, invited exceptions and indicated that it was not of universal application, thus:

> "Where not otherwise distinctly expressed or *manifestly incompatible with the intent hereof*, the word 'person,' as used in this title shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person." (Emphasis supplied.)

Petitioner here assumes a desperate and dangerous position. A desperate position because it asks this Court in effect to strike out the word "person" in Section 201(d) for the *asserted* reason that Congress did not know what it was doing when it used the term but for the *real* reason only of winning this case.

Petitioner's contention is dangerous for it could equally well be applied to practically any statute which is extensively amended on its course through Congress.

It would virtually establish a rule that *where a bill is amended on its way through the Legislature, no critical words inserted by an amendment will be given effect by the courts unless the amendment is accompanied by a Committee or Conference Report showing the intent to insert such words and the purpose thereof.*

Any statutory language could be disregarded which the judges do not *now* think reflects what ought to have been the congressional intent a decade or two ago, or which

does not express what it would have expressed if the Court had been the Legislature.

It can hardly be shown that Congress did not know what it was doing when it used "person" in Section 201(d), because the same word appeared with the same limited meaning in the very next paragraph, 201(e), and both were followed by 201(f) which confirmed and reinforced them by declaring that *no provision (which of course included the definitions in (d) and (e) just above) of Part II should apply to the United States, a state, etc.*

Lengthy hearings and debates were held on the act and such experts as Commissioner Seavey of FPC and Mr. Dozier A. DeVane, Solicitor for FPC, were in attendance, testifying, watching, and assisting in passing the legislation. (Senate Hearings on S. 1725, Apr. 16-29, 1935, 74th Congress, pp. 223, 224, 232-257; House Hearings on H. R. 5423, 74th Congress, 1st Session, Feb. 19, 1935, pp. 384-559.)

It is significant that Section 201(d) has remained undisturbed for 17 years and, if it contained such glaring misprision, such egregious blunder as now alleged so as adversely to affect the United States, the forty-eight states, and several thousand municipalities and governmental agencies, certainly FPC would have asked Congress to correct the error. That it did nothing of the kind indicates that it had no hope of success from that source, but preferred to accomplish the purpose by its own decisions and those which it could persuade the courts to make.

May we not suggest that, in view of the fact that the congressional avenue is still open, it would be inappropriate for this Court to take such unprecedented liberties with legislation functions as it is now asked to do.

(b) Company's Sales to Mineral County Are Merely Part of Company's Distribution Service in Mono County, California, and as Such Are Exempt From Regulation Under Part II.

A distribution system need not be a *typical* distribution system. Company's distribution system and business in Mono County are certainly not *typical* of larger centers of population such as cities or even closely built rural areas. Mono County is a remote, mountainous county, with an average elevation of more than 7,000 feet above sea level, a very sparse population, and little industry, except mining and cattle grazing. Power Company distributes electric energy to the public in said county where and to the extent demanded, but it cannot create power demands or multiply customers beyond the capacity of the county's population and economy. Power Company's facilities at and about the Mill Creek Plant, including the 55 kv line extending from Mill Creek to Leevining substation are used principally for the distribution of power in that locality, including the Navy's purchases for use in its ammunition depot.

There is no generally recognized standard of distinction between the transmission and the distribution of electric energy, either engineeringly or legally, and if facilities are

used at all in local distribution, that ends the matter so far as FPC jurisdiction is concerned, even though they are also used for transmission.

Connecticut L. & P. Co. v. Fed. Power Com. (*supra*).

Section 201(b) exempts facilities used in local distribution, but does not require that they be used exclusively for that purpose. If they are used for local distribution at all, they are exempt. The situation is analogous to that in *Jersey Central P. & L. Co. v. Fed. Power Com.* (*supra*), where it was held that, since the transmission of electric energy in interstate commerce constituted the Company a public utility under the act, and since Congress had not specified any percentage no matter how small that might be disregarded, therefore; the transmission of any energy whatever in interstate commerce, even unintentionally, was sufficient to include that Company. So here, since Congress has not specified any amount or proportion of distribution that must be carried on to constitute "use in distribution," any distribution at all is sufficient to exempt facilities from FPC jurisdiction. Since the facilities are used in distribution, the energy sold therefrom is sold in distribution and is purely intrastate commerce.

Conclusion.

This case should be dismissed because:

1. Company's rates to Mineral County are, at this stage, subject to regulation by state or state commissions and not by FPC.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of December, A. D. 1952.

12-31-52—80